

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:RFP:STP:TL-N-58-01  
JForsberg

date: January 4, 2001

to: Mike Beckman  
Bloomington POD

from: Associate Area Counsel (LMSB)  
North Central District, St. Paul

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subject: [REDACTED]  
Form 872

Our advice has been requested as to the proper form for a Form 977 (Consent to Extend the Time to Assess Liability at Law or in Equity Against a Transferee or Fiduciary) to extend the statute of limitations for the assessment of transferee liability against [REDACTED] with respect to the income tax liability of [REDACTED] for the taxable year ended December 31, [REDACTED]. For the reasons discussed below, we suggest that you not solicit a Form 977 from [REDACTED] at this time, but that you solicit a Form 872 from [REDACTED].

FACTS

[REDACTED] was a Delaware corporation formed on [REDACTED], with the intent of qualifying as a real estate investment trust ("REIT") under Subchapter M of Chapter 1 of Subtitle A. [REDACTED] was utilized by [REDACTED] (now [REDACTED] in a fast-pay stock transaction (also known as step-down preferred stock transaction).

[REDACTED] had [REDACTED] shares of common and [REDACTED] shares of preferred stock issued and outstanding. The common stock was held by [REDACTED]. (In [REDACTED] [REDACTED] acquired old [REDACTED] and assumed the [REDACTED] name). The preferred stock was originally issued to [REDACTED] which subsequently marketed it to various unidentified entities. The preferred stock was redeemed on [REDACTED]. [REDACTED] was liquidated and dissolved in [REDACTED]. [REDACTED] filed Forms 1120-REIT for both its taxable year ended December 31, [REDACTED], and its short final taxable year ended June 25, [REDACTED]. [REDACTED]'s [REDACTED] Form 1120-REIT was filed on or

about [REDACTED]. The statute of limitations for [REDACTED]'s taxable year [REDACTED] will expire on [REDACTED].

#### DISCUSSION

As a threshold matter, we agree that it is advisable to keep the statute of limitations open as to any liability which [REDACTED] may have with respect to the fast-pay stock transaction. At this point we are of the opinion that the adjustments ultimately proposed with respect to the fast-pay stock transaction will likely be made against [REDACTED] (formerly [REDACTED]), the holder of [REDACTED]'s common stock, and not against [REDACTED] itself. However, as neither the facts of the case nor the Service's legal position are yet fully developed, it is prudent to keep [REDACTED]'s statute open if possible.

We do not agree, however, that a Form 977 should be solicited from [REDACTED] at this time. While the statute of limitations for [REDACTED]'s taxable year [REDACTED] will expire on [REDACTED], the statute of limitations for assessing any transferee liability due from [REDACTED] with respect to that year will not expire until one year latter on [REDACTED]. I.R.C. § 6901(c)(1).

In lieu of soliciting a Form 977 from [REDACTED], we suggest that you solicit a Form 872 from [REDACTED] for its taxable year [REDACTED]. Obtaining a Form 872 from [REDACTED] would not only extend the primary statute, but would also have the effect of extending the transferee statute under I.R.C § 6901(c)(1).

Although [REDACTED] has been dissolved, under Delaware law [REDACTED] can, for a period of three years after its dissolution, continue to take actions incident to winding-up its affairs. Specifically, DEL. CODE, Title 8, § 278 (2000) provides:

All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct, bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge liabilities, and to distribute to their stockholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized.

Both the predecessor Delaware statute and similar statutes in other states have been construed as authorizing corporate officers to execute statute extensions subsequent to a corporation's dissolution. See, Sanderling, Inc. v. Commissioner, 66 T.C. 743 (1976) (New Jersey statute); Associates Investment Company v. Commissioner, 59 T.C. 441 (1972) (Nebraska statute); and H.D. Walbridge & Company, Inc. v. Commissioner, 25 BTA 1109 (1932) (predecessor Delaware statute). Consistent with the Delaware statute and the relevant case law, for a period of three years following the dissolution of [REDACTED] in [REDACTED] of [REDACTED], an appropriate officer of [REDACTED] can execute a Form 872 extending [REDACTED]'s statute of limitations.<sup>1</sup>

The Form 872 solicited from [REDACTED] should be prepared in the name of "[REDACTED]" and [REDACTED]'s full address as shown on its return ("[REDACTED]") should be shown in the space for the taxpayer's address. As a REIT is taxable under Subchapter M, Chapter 1, of Subtitle A, the type of tax should be shown as "income." The Form 872 should be executed on behalf of [REDACTED] by an officer duly authorized to act on behalf of the corporation. See, Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. ([REDACTED]'s officers are listed on the Certificate of Dissolution.) The corporate name above the signature line should be shown as "[REDACTED]." The Form 872 should be executed on behalf of the Director, Field Operations, according to the current LMSB delegation order.

At the time the Form 872 is solicited, the taxpayer should be advised of its right to refuse to extend the statute or limit the scope of the extension as provided under I.R.C. § 6501(c)(4)(B). I.R.C. § 6501(c)(4)(B) requires that the IRS advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that it solicits a statute extension. To satisfy this requirement, you may provide the taxpayer with Publication 1035 ("Extending the Tax Assessment Period") at the time you solicit the Form 872. Alternatively, you may advise the taxpayer orally or in some other written form of the I.R.C. § 6501 requirement. Regardless of which method you use, you should document your actions in this regard in the case file. Although section 6501(c)(4)(B) does not

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<sup>1</sup> As the Delaware statute explicitly limits to three years the winding-up period during which the corporate existence is continued, any Forms 872 executed on behalf of [REDACTED] after the three-year period will not be valid. See, Union Shipbuilding Company v. Commissioner, 43 BTA 1143 (1941).

provide a sanction or penalty on the Service's for failure to comply with the notification requirement, a court might conclude that an extension of the statute of limitations is invalid if the Service did not properly notify the taxpayer. Thus, it is important to document your actions in this regard in the case file.

If you have any questions concerning this matter, please call Jack Forsberg at (651) 290-3473, ext. 227.

REID M. HUEY  
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By: *Jack Forsberg*  
JACK FORSBERG  
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cc: Associate Chief Counsel  
(Procedure and Administration);  
Barbara Franklin (CC:LM); and  
Darlene Forgy, Brooklyn Center POD.